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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 657 .

WILLIAM RICHMOND of Plainville, Connecticut,

Petitioner,

—against—

THE SHELBY MUTUAL CASUALTY COMPANY OF SHELBY, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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IN THE

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THE SHELBY MUTUAL CASUALTY COMPANY OF SHELBY, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that court which reversed the judgment of the United States District Court for the District of Connecticut.

Opinions Below.

The opinion of the United States Court of Appeals (R. 235) is reported in 118 F. (2d) 803.

The findings of fact of the District Court (R.190-198), memorandum of decision on the trial (R. 199-205), memorandum of decision on motion to amend findings (R. 216-217), and the findings of fact as amended (R. 218-226) are not yet reported.

A petition for rehearing was denied on the 5th day of January, 1951 (R. 252), and the order entered on the same day (R. 253).

I.

Statement of Jurisdiction.

The District Court had jurisdiction under the Declaratory Judgment Act (28 USC 2201). The Court of Appeals acquired jurisdiction by virtue of the provisions of 28 USC 1291 and this Court may grant this petition for certiorari and hear this appeal by virtue of the provisions of 28 USC 1254 (1).

The judgment of the Court of Appeals sought to be reviewed was entered on December 14, 1950 (R. 244), and a petition for rehearing filed December 27, 1950 was denied January 5, 1951 (R. 252).

II.

The Questions Presented.

There are four questions which the petitioner desires to present to this Court if certiorari is granted.

1. The first is whether the Court of Appeals may ignore a finding of fact that the insured cooperated (which the Trial Court has on motion refused to

disturb) and substitute for it an apparently contradictory dictum contained in the Trial Court's memorandum of decision.

2. The second is whether after the Trial Court has specifically found that the insured has cooperated, and then by way of dictum concluded that, in any event, the insurance company is estopped to set up lack of cooperation, the latter conclusion vitiates the finding of fact that the insured was cooperative.

3. The third is whether the Court of Appeals may construe an ambiguous finding that *"during the course of trial"* counsel engaged by Shelby to defend Fiedorczyk revealed to Richmond's attorney that Shelby claimed to be defending under a reservation of rights into a finding contrary to the credited evidence that Richmond and his counsel were perfectly aware *before the trial* of such reservation.

4. The fourth is whether the Court of Appeals where two reasonable inferences may be drawn from proven facts may substitute its judgment for that of the Trial Court and reject one inference drawn by the Trial Court and adopt the other.

III.

Summary Statement of Matter Involved.

This is an action for a declaratory judgment to establish the liability of The Shelby Mutual Casualty Company on account of a judgment rendered against its insured Fiedorczyk in favor of the petitioner Richmond. The petitioner filed in the Trial Court a counterclaim claiming the amount of that judgment.

On November 15, 1945, the respondent insurance company issued a standard garage liability policy to one Fiedorczyk, a defendant below, for the period November 30, 1945 to November 30, 1946, the permium to be paid in three installments on November 30, 1945, February 28, 1946 and May 30, 1946. The policy afforded protection to Fiedorczyk against liability for personal injury arising out of Fiedorczyk's activities as an automobile dealer, including the ownership or use of any automobile in connection with such activities and also for pleasure use.

On December 7, 1945, Fiedorczyk sold to one Albino a 1934 Oldsmobile sedan for $200, of which $100 was then paid and the balance before December 27, 1945. Albino took possession of the car immediately and drove it away bearing Fiedorczyk's Connecticut dealer's registration plates but returned the car to Fiedorczyk for repairs as it did not run properly. On December 27, 1945, the repairs having been completed, Albino resumed possession of the car still bearing Fiedorczyk's markers. On that same day Albino, while operating the car on no business connected with Fiedorczyk, hit and seriously injured the petitioner Richmond. Thereafter, Albino returned the car to Fiedorczyk, who sold it to one Cavanaugh on February 15, 1946, for $200, of which he retained $50 and remitted $150 to Albino. As Fiedorczyk had not filed with the Motor Vehicle Commissioner, in accordance with Connecticut law, an affidavit of his sale to Albino, when the sale to Canvanaugh was completed he filed with the Commissioner an affidavit indicating the sale was from him (Fiedorczyk) to Cavanaugh directly.

Meantime, immediately after the accident in which the petitioner Richmond was injured, Fiedorczyk and Albino conspired to concoct a story of the accident

which would afford Albino the protection of Fiedorczyk's insurance policy. Accordingly, they agreed upon a version which would have Albino delivering gasoline to a stranded car in Plainville, Connecticut, owned by one Sorice, at Fiedorczyk's request and in the course of Fiedorczyk's business. Sorice agreed to participate in the conspiracy. On December 29, 1945, Fiedorczyk and Albino went to the office of Attorney Stanley Plocharczyk in New Britain and told him that Albino was on a business errand for Fiedorczyk at the time of the accident. Albino signed and swore to a motor vehicle report which stated that Fiedorczyk was the owner and that Albino was at the time of the accident operating the car as a friend of the owner. That report was filed with the Motor Vehicle Commissioner in accordance with the statute. Further on January 2, 1946, Fiedorczyk gave a false written statement to the respondent The Shelby Mutual Casualty Company containing the concocted version but on the next day, January 3rd, retracted it. Albino, likewise, having given the false version on January 3rd, retracted it on January 4th. On January 3, 1946, the insurance company orally warned Fiedorczyk that failure to cooperate might result in the loss of the protection of the insurance policy. Thereafter the insurance company received and accepted installments of premium on that policy in February and May 1946.

On March 9, 1946, the respondent Richmond brought an action for $25,000 against Fiedorczyk, claiming that the car in question was owned by Fiedorczyk and was being operated at the time of the accident by Albino with the consent of Fiedorczyk and as his agent and servant.

On March 14, 1946, the respondent The Shelby Mutual Casualty Company wrote to Fiedorczyk that

the claim for damages was in excess of the policy limits and that their investigation disclosed that Albino not Fiedorczyk was the owner of the car. The letter further advised that a firm of attorneys were entering an appearance for Fiedorczyk with, however, "full reservation of our rights under the contract of insurance." The letter added that as the suit was for damages in excess of the policy limits and "since our policy does not cover for this particular accident," Fiedorczyk was at liberty to retain his own counsel. Nothing was said in that letter about Fiedorczyk's failure to cooperate.

On May 25, 1946, Sorice gave the respondent insurance company a statement bearing out the early concocted version and then on June 13, 1946, gave it a statement of retraction.

The trial of the case of *Richmond* v. *Fiedorczyk* began in the Superior Court for Hartford County on Thursday, October 23, 1947, and ended on Tuesday, October 28, 1947, in a verdict for the plaintiff for $14,500. The firm of Butler, Volpe and Garrity, retained by the insurance company, represented Fiedorczyk throughout the trial. Sometime during the trial (the finding is not specific), counsel for The Shelby Mutual Casualty Company revealed to counsel for respondent Richmond that the case was being handled under a reservation of rights and that no judgment would be paid but no reason was assigned therefor.

When the trial began on Thursday, October 23, 1947, the plaintiff in the action, Richmond, had under Connecticut law the advantage of two presumptions. The first was the presumption that the registered owner of a car is the true owner (*Kaplenski* v. *Hor-*

witz, 114 Conn. 523, 159 Atl. 351). The importance of this presumption is that it gave active support to the plaintiff's claim that Fiedorczyk was the owner of the car since it bore his dealer's registration plates. The second, a statutory presumption that the operator of a motor vehicle, other than the owner, is presumed to be the agent of the owner within the scope of his authority (Section 7905, Gen. Stats. Rev. 1949, formerly Section 1661c of the Statutes of 1935) is construed to avail the plaintiff until the trier of fact finds countervailing evidence true. In this respect it forecloses the possibility of a non-suit or directed verdict and takes the case to the jury without more (*Lockwood* v. *Helfant,* 126 Conn. 584, 13 Atl. (2d) 136).

Though armed with these presumptions, counsel for plaintiff Richmond, who had been retained the very day of trial for the purpose of presenting the case, gave serious consideration to an offer of $500 tendered by counsel for Shelby just before trial. Shelby's counsel claimed he could prove Albino to be the owner of the car and, as evidence of the fact, produced what he claimed to be a copy of an affidavit of sale from Fiedorczyk to Albino. It turned out to be the original affidavit which Fiedorczyk had never filed. The offer of $500 was rejected and the trial proceeded.

After court adjourned the evening of October 23, 1951, counsel for Richmond noted in the photostatic copy of Albino's motor vehicle report that Attorney Stanley Plocharczyk had taken Albino's oath to the statement in the motor vehicle report that Fiedorczyk was the owner of the car. Plocharczyk, in a telephone conversation with Richmond's counsel that evening confirmed the fact that Albino had so stated under

oath and in addition revealed that both Fiedorczyk and Albino had told him that at the time of the accident Albino was on a business errand for Fiedorczyk.

With this evidence in his possession and, not knowing what Shelby and its counsel knew, that it was a fabricated story already repudiated by all the conspirators, counsel for Richmond next day proposed to win his case, not on the presumptions but on Attorney Plocharczyk's affirmative evidence and the documentary evidence. He asked for $4,000 in settlement, which was refused because Shelby would contribute only $2,000 and Fiedorczyk nothing. On that day, *i. e.*, the second day of the trial, Friday, October 24th, Attorney Plocharczyk testified for the plaintiff and related the version as Fiedorczyk and Albino had given it to him on December 29, 1943, to the effect that Fiedorczyk was the owner of the car and Albino was either delivering or picking up parts for him at the time of the accident. Before Plocharczyk took the stand, Shelby's counsel asked Fiedorczyk if he knew why Plocharczyk was in the court room. Fiedorczyk answered in the negative, believing mistakenly that Plocharczyk would not testify because of privilege between attorney and client. Counsel for Richmond at the trial that day also laid in evidence the unrecorded affidavit of sale from Fiedorczyk to Albino and also Albino's motor vehicle report and the affidavit of sale from Fiedorczyk to Cavanaugh, the latter two of which had been on file and a matter of public record since their filing in early 1946.

Over the weekend, on Monday, October 27th, while court was not sitting, Shelby's representatives talked to Fiedorczyk in New Britain and he admitted that Attorney Plocharczyk's testimony was true and that he and Albino had told him the concocted version

which they had later repudiated to Shelby but not to Plocharczyk.

At that point Shelby's position became extremely delicate for, if it revealed what it knew regarding the early conspiracy and if Fiedorczyk were to testify as he stated to Shelby's representatives on Monday that Plocharczyk had been truthful in relating that Fiedorczyk and Albino had told him the concocted version, the credibility of Fiedorczyk and Albino would be destroyed and the presumptions heretofore referred to would insure a verdict for Richmond. On the other hand, if Fiedorczyk were permitted to testify falsely to the effect that he had never told Plocharczyk the concocted version, there was a chance that the jury might believe him and render a verdict for the defendant Fiedorczyk. In the latter event, if there were a verdict for the plaintiff, it was obvious that it could be collaterally attacked as based on evidence which Fiedorczyk had initially manufactured and had never, it would be claimed, effectively repudiated. In other words, if Shelby continued to conceal the conspiracy, it had a chance to avoid payment in this case.

When, therefore, the trial opened on its last day, Fiedorczyk in rebuttal was put on the witness stand and denied Plocharczyk's testimony in response to a series of leading questions as follows:

> "Q. Now, what time on December 27th did he leave your place of business? A. Well, it was sometime in the afternoon.
>
> Q. Did you know where he was going? A. I did not.
>
> Q. Did you know what he was going to do? A. I did not.

Q. Did you have any arrangement with him to do anything for you. A. Not a thing.

Q. Did he go to get any parts for you? A. Never did.

Q. Or to bring any parts for you. A. Never did.

Q. Did you ever tell Mr. Plocharczyk that he went out that afternoon either to pick up parts or to deliver parts for you? A. Never did.

Q. When was the first time you heard that story. A. Right in this Court here."

The jury, obviously disregarding Fiedorczyk's testimony and crediting Plocharczyk's, rendered a verdict in favor of Richmond for $14,500 from which no appeal has been taken and no part of which has been paid by Fiedorczyk and none of which has been paid by Shelby.

The Trial Court found for the petitioner Richmond on four issues. In the first place, it found that there was coverage in that the complaint alleged ownership by Fiedorczyk and agency by Albino; that those issues were contested and litigated by counsel supplied by Shelby and found adversely to Shelby's contentions in the Superior Court, which finding it held binding on Shelby in this proceeding. Inasmuch as the Court of Appeals did not pass upon that issue but based its findings on other issues, that phase of the case is not of moment in the consideration of this petition. However, the Trial Court in finding for the petitioner Richmond held in the second place that the conspiracy of January 2nd had been waived by the acceptance of installment premiums after that date and by Shelby's conduct (see paragraph 5 of conclusions of law, p. 198 of the Record); in the third place, that after that conspiracy Fiedorczyk attempted in good

faith to cooperate with Shelby, "not realizing the potential danger to their (Shelby's) position of two steps already taken before January 3, 1946, to carry out the conspiracy, (1) the motor vehicle report and the conference with Plocharczyk in making it out, or (2) the danger in the form used in making out the affidavit of sale to Cavanaugh in February 1946" (see paragraph 34 of Amended Finding, p. 225 of the Record); and in the fourth place, that Shelby is estopped to raise the issue of non-cooperation.

The Court of Appeals disregarded the finding of the Trial Court that Fiedorczyk, after the initial conspiracy (which had been waived), had in good faith attempted to cooperate and instead substituted from the Trial Court's memorandum of decision an incidental statement that the concealment of the existence of the two public documents (Albino's motor vehicle report and the affidavit of sale to Cavanaugh) would "ordinarily be sufficient ground for a defense of non-cooperation." In addition it rejected the Trial Court's finding that Richmond was induced to continue his litigation by the failure of Shelby to reveal that evidence. Consequently it reversed judgment for Richmond and ordered judgment entered for Shelby.

IV.

Reasons Relied on for the Allowance of the Writ.

It is the claim of the petitioner Richmond that two universally recognized canons of Appeals procedure were violated by the opinion of the Court of Appeals:

(1) That the Trial Court "speaks" to the Court of Review only through its Finding, which can-

not be modified or controlled by a statement in a Memorandum of Opinion.

American Ins. Co. v. *Scheuffler,* 129 Fed. 2d 143;

American Ins. Co. v. *Lucas* (Mo. 1941), 38 Fed. Supp. 926, Appeals dismissed 62 S. Ct. 107, 314 U. S. 575, certiorari denied 317 U. S. 687;

United States v. *Van Dusen,* 78 Fed. 2d 121;

General Metals Powder Co. v. *S. K. Wellman Co.,* C. C. A. Ohio 1946, 157 Fed. 2d 505, certiorari denied 329 U. S. 812, rehearing denied 330 U. S. 854;

Brooks Bros. v. *Brooks Clothing of California,* D. C. (California 1945) 5 F. R. D. 14.

(2) That an ambiguous finding, not otherwise clarified in the record, must be construed to sustain the judgment.

Shockley v. *Travelers Ins. Co.* (Wash. 1943), 137 Pac. 2d 117;

Royal Realty Co. v. *Harvey Investment Co.* (Cal. 1928), 272 Pac. 805;

C & O Oil Co. v. *Curtis Funeral Home* (Vt. 1934), 175 Atl. 9;

Hill v. *Grant* (N. Y. 1871), 46 N. Y. 496;

Finken v. *Elm City Brass Co.* (Conn. 1900), 73 Conn. 423, 47 Atl. 670;

New Haven Mfg. Co. v. *New Haven Pulp, etc. Co.* (Conn. 1903), 76 Conn. 131, 55 Atl. 607.

A.

Basic to the Opinion of the Court of Appeals is the assumption that Fiedorczyk's non-disclosure to plaintiff of the incidents of the Motor Vehicle Report and Affidavit of Sale to Cavanaugh were acts of non-cooperation. That the Trial Court may have tentatively so regarded them appears from the statement in its Memorandum of Opinion:

> "There was a waiver, by the conduct of Shelby, of the non-cooperation of Fiedorczyk known to Shelby up to the time of the letter of reservation, that is, of the 'cooked-up' story. There could be no waiver, in the usual sense of the word, of Fiedorczyk's concealment of the two statements outstanding, (Albino's Motor Vehicle Report and Affidavit of Sale to Cavanaugh) for Shelby then had no knowledge of their existence. And this concealment would ordinarily be sufficient ground for a defense of non-cooperation on Shelby's part, for the statements seriously affected its position in defense or settlement of Richmond's claim."

and its invocation of estoppel to avoid forfeiture on this ground. But that the Trial Court actually found—and refused on motion to disturb—facts directly repugnant to its opinion above quoted, is equally clear from Paragraph 34 of the Finding as Amended:

> "From the time of the statement of January 3, 1946, Fiedorczyk attempted in good faith to cooperate with plaintiff Shelby in the defense of the action brought by Richmond, *not realizing*

> the potential danger to their position of two steps already taken before January 3, 1946 to carry out the conspiracy,—(1) the motor vehicle report of Albino and the conference with Plocharczyk in making it out, or (2) the danger in the form used in making out the affidavit of sale to Cavanaugh, in February, 1946." (Italics supplied.)

Shelby's entire case on this phase of its claim of non-cooperation is alleged in its Complaint as follows (italics supplied):

> *"In furtherance of said scheme or conspiracy,—* * * * the said Fiedorczyk *wrongfully* withheld and concealed from the servants and agents of the plaintiff his share and participation in the preparation and filing of said false (Motor Vehicle) report."

Paragraph 34 of the Finding expressly holds that such concealment was *not* in furtherance of any scheme or conspiracy, which had long since been abandoned, and was not *wrongful,* but, on the contrary, was innocently motivated by ignorance.

The Trial Court's Finding, Paragraph 34, that Fiedorczyk attempted in good faith at all times following the abandonment of his attempt to misrepresent, to cooperate and assist plaintiff in defense of Richmond's claim, is a specific finding, not of non-cooperative conduct in breach of his contract, but of his attempt to do his best to live up to it. This finding is a repudiation of the allegation made by plaintiff in its Complaint and upon which its case on non-cooperation essentially rested. It is a re-

pudiation of the very basis presupposed and unexamined by the Court of Appeals, whose ruling is directed not to the fact of non-cooperation, which it assumes, but to the evidence of the conduct (concealment by plaintiff from Richmond and its effect upon the latter), which was held by the Trial Court to prevent by estoppel its assertion.

That the Trial Court, despite this finding of good faith and cooperation, did, nevertheless, invoke an estoppel to arrive at its conclusion, ought not to militate against the fact itself of which the Trial Court was the sole judge, that Fiedorczyk attempted in good faith to cooperate. And that the Trial Court's statement in its Memorandum of Opinion that Fiedorczyk's non-disclosure, however done in good faith, may have been an act of non-cooperation, ought not to be permitted to derogate from the fact itself is clear from the cases, all of which hold or infer that bad faith or intentional misconduct is the *sine qua non* of non-cooperation.

Finkle v. *Western Auto. Ins. Co.* (Mo. 1930), 26 S. W. 2d 843;

Medico v. *Employer's Liability Assurance Corp.* (Me. 1934), 172 Atl. 1;

Wheeler v. *Lumbermen's Mutual Casualty Co.* (Me. 1933), 5 Fed. Supp. 193;

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Guerin v. *Indemnity Ins. Co. of N. A.* (Conn. 1928), 107 Conn. 649, 142 Atl. 268;

Farmers Auto. Inter-Insurance Exchange v. *Konugres,* 202 Pac. 2d 959.

The function of the Trial Court is to find truth as it sees it, and if, after so finding a material and controlling fact, it misinvokes by dictum an irrelevant proposition of law to arrive at a just conclusion, its means should not be held controlling of its end and an Appellate Court's ruling directed wholly to the former should not be permitted to control the latter.

B.

Richmond, until late in the State Court trial, had no knowledge that the case was being defended by Shelby under a reservation of its rights, and that no judgment would be paid.

The Trial Court's Finding, Paragraph 12, Record, page 225:

> "*During the course of the trial,* counsel engaged by Shelby to defend Fiedorczyk revealed to Richmond's attorney that plaintiff Shelby claimed to be defending under a reservation of rights and would not pay any judgment recovered." (Italics supplied.)

supports this claim, since, under all rules of Appeals procedure, an ambiguous finding should be construed to sustain the judgment. The Court of Appeals not only does not so construe it, but in support of its opinion and contrary to the finding, holds as a fact that Richmond was "perfectly aware" *before the trial* that Shelby was defending the case under a

reservation of coverage rights, and infers that Richmond knew what those rights were, when, in fact, he was in complete ignorance of them.

C.

The Trial Court inferred that Richmond was induced to continue his litigation by Shelby's concealment of facts concerning the early conspiracy, a knowledge of which, if seasonably known, would have disclosed the invalidity of the evidence upon which he was innocently relying, and which would be valueless in a second trial on the contract.

This inference was rejected by the Court of Appeals, since, concluded this Court, it could not be reasonably inferred that disclosure by Shelby would have terminated the litigation. Had disclosure been openly made in Court, so the Court of Appeals states, the Jury might still have disbelieved the disclosing testimony and found for Richmond. This is obviously quite true, but it does not destroy the legitimacy of the inference drawn in Paragraph 36 of the Finding, since, under circumstances of such disclosure, Richmond could, and obviously must have continued his case, no longer on the basis of Plocharczyk's story, but on the basis of the legitimate presumptions under Connecticut law referred to, with the benefit of which he started his trial. And a verdict returned for him on that basis, squarely within the coverage of plain-

tiff's policy and untainted by any vice of non-co-operation, could not, in any subsequent suit on the policy, be successfully challenged.

PETITIONER,

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Respondent.

BRIEF OF THE RESPONDENT, THE SHELBY MUTUAL CASUALTY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HUGH M. ALCORN,
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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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BRIEF

FOR THE

RESPONDENTS

IN

OPPOSITION

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OCTOBER TERM, 1950.

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WILLIAM RICHMOND of Plainville, Connecticut,

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—against—

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BRIEF OF THE RESPONDENT, THE SHELBY MUTUAL CASUALTY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the United States Court of Appeals is reported in 185 F. (2d) 803.

The opinion of the District Court has not yet been reported.

II.

Jurisdiction.

The petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U. S. C. Section 1254 (1).

III.

Statement of Facts.

On December 7, 1945, and for some time prior thereto, one Casimer Fiedorczyk operated a garage and, in connection therewith, sold used cars.

Prior to December 7, 1945 the assured Casimer Fiedorczyk purchased a policy of limited garage liability insurance from the plaintiff.

On or about December 7, 1945 the assured Fiedorczyk sold a used car to one Michael Albino.

Said Albino returned the car to Fiedorczyk's garage for certain repairs, and on December 27, 1945 said Albino picked up said car, drove away from the garage, and later on that same day struck and injured the assured William Richmond. At the time of the accident the car belonged to Albino. Albino was on an errand of his own. Albino was not on an errand for Fiedorczyk and Fiedorczyk did not know where he was.

Subsequent thereto Albino and the assured Fiedorczyk conspired to "cook up" a story whereby

Fiedorczyk's insurance would cover the operation of the car by Albino.

Pursuant to the conspiracy the assured Fiedorczyk and Albino invented a story to the effect that the car was being used at the time of the collision by Albino on an errand for the assured Fiedorczyk's business. In furtherance thereof they visited an attorney and executed a false motor vehicle accident report indicating that the assured was the owner of the car. They further agreed to make false statements to the insurer and made such statements. Albino and the assured Fiedorczyk thereafter retracted the false statements to the insurer and gave the insurer a true statement of the facts. However, they never revealed the existence of the false motor vehicle accident report. Over a month after the retraction of false statements the insured Fiedorczyk sold the vehicle for Albino and falsely reported to the Motor Vehicle Department that the car belonged to the assured Fiedorczyk but never revealed the filing of this false statement to the insurer.

The petitioner William Richmond brought suit against the assured Fiedorczyk in the Superior Court for Hartford County. The plaintiff furnished attorneys to defend the action on behalf of the assured Fiedorczyk as required by the policy but repeatedly notified Fiedorczyk that the case was handled under a reservation of rights and that the plaintiff would pay no judgment rendered. The plaintiff also notified the petitioner Richmond's counsel and the judge presiding over the action in the Superior Court that the case was handled under a reservation of rights and that no judgment would be paid by the plaintiff.

The insurer first learned of the existence of the false motor vehicle report and the false affidavit of sale when the same were introduced by Richmond in the Superior Court action. Even at the time of the trial of the Superior Court action the insured still denied that he had told the false story to any person and failed to disclose the visit to the attorney during the course of which the false motor vehicle report was executed.

The Superior Court rendered judgment in favor of the petitioner William Richmond against the assured Fiedorczyk in the amount of $14,500. The respondent insurer refused to pay said sum and brought this action in the District Court to determine its rights.

IV.

A.

The petitioner claims that there are four questions which he desires to present to this Court. On the first two questions he appears to claim that the Court of Appeals has ignored a finding of fact that the assured cooperated, and has found lack of cooperation based on the memorandum of decision.

In the first place, the trial court did not find as a fact that the insured cooperated. The trial court found in paragraphs 12, 13, 14, and 31 that the insured Fiedorczyk conspired to make his insurance cover his friend Albino and, in pursuance thereof, filed two false reports with the Motor Vehicle Department of the State of Connecticut. The petitioner quotes in

part A of his petition paragraph 34 of the Findings of Fact as amended and claims that this paragraph constitutes a finding of cooperation. This paragraph, however, merely states that after a certain date the insured "attempted" to cooperate "not realizing the potential danger" of the steps taken prior to that date to carry out the conspiracy. This paragraph of the finding in fact negatives cooperation and indicates that steps already taken in furtherance of the conspiracy could not be undone.

There are other instances of non-cooperation. However, the foregoing is sufficient to compel the Court of Appeals to arrive at a conclusion of non-cooperation from the subordinate facts found.

> "So if LeClerc in his statement or his testimony had untruthfully assumed liability for the accident that would have been, to say the least, a failure to cooperate and assist. * * * It is not found that there was any failure to furnish information to the defendant nor that the information furnished was intentionally false. Upon this record it cannot be said that the court erred in reaching the conclusion that there was no breach of this condition of the policy."
>
> *Guerin* v. *Indemnity Ins. Co.*, 107 Conn. 649, 655, 142 Atl. 268 (1928).

Conversely, in the instant case the lack of cooperation and the breach of the condition of the policy is a conclusion which, as indicated in the trial court's memorandum of decision, was the only conclusion which the Court of Appeals could reach.

> *American Propeller Co.* v. *U. S.*, 300 U. S. 475 (1937);

Davis v. *Margolis,* 107 Conn. 417, 140 Atl. 823 (1928);
Hadfield v. *Tracy,* 101 Conn. 118, 125 Atl. 199 (1924).

B.

The third question presented by the petitioner is whether the Court of Appeals may construe a finding that "during the course of trial" the petitioner's attorney was notified of the reservation of rights, which finding the petitioner characterizes as "ambiguous", to mean that petitioner and his counsel were aware before the trial of the reservation. In Section B of his brief the petitioner persists in construing this phrase to mean "late" in the state court trial. The only evidence is that petitioner's counsel was notified during the preparations to start the trial which was before the trial actually commenced and, as correctly observed by the Court of Appeals, before the actual defense of the suit against the assured.

Paragraph 33 of the Finding finds that "early" in the trial an offer of settlement in the amount of $500 was made. The undisputed evidence is that at the time the offer of $500 was made counsel for the petitioner was notified that the case was being handled under a reservation of rights and that that was the reason for the nominal offer. The only evidence on this point is to the effect that it was "during the preparations to get ready for trial" (Record page 107, folio 321). If this be considered early in the trial itself, it was in fact so early that it was, as the Court of Appeals correctly observes, before the defense actually got underway. So far as it may be mate-

rial to this case it was certainly early enough to warn the petitioner that if the trial actually took place, the respondent would not pay any judgment that might be rendered.

The appellate court can properly construe or correct a finding made in language of doubtful meaning.

> *Spector Motor Service, Inc.* v. *Walsh,* 135 Conn. 37, 47, 61 Atl. (2d) 89 (1948).

This matter was properly considered by the Court of Appeals under Rule 52 of the Federal Rules of Civil Procedure.

> *Aetna Life Insurance Co.* v. *Kepler,* 116 F. (2d) 1 (1941);
> *Katz Underwear Co.* v. *U. S.,* 127 F. (2d) 965 (1942).

C.

In his fourth question the petitioner claims that the Court of Appeals may not reject an inference found by the trial court. In Section C of his brief he complains of the rejection by the Court of Appeals of the inference drawn by the trial court that the petitioner and his attorney were induced to continue litigation in the state court by the failure of the insurance company to disclose the conspiracy to them.

There was no evidence whatever as to the motives of the petitioner and his attorney in conducting or continuing the trial. Neither petitioner nor his attorney testified in the District Court. They might have hoped that the company would pay a judgment or

they might have felt that they could collect a judgment from the insured himself. The finding of the District Court was a matter of sheer speculation.

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
>
> *U. S.* v. *Gypsum Co.*, 333 U. S. 364, 395 (1948).

See

> *District of Columbia* v. *Pace*, 320 U. S. 698, 702 (1944).

In the instant case there was not even evidence to support the inference drawn by the trial court, and the Court of Appeals properly rejected it.

Conclusion.

The petitioner states in his petition that the Court of Appeals violated two canons of procedure, claiming that a finding can not be modified or controlled by a statement in a memorandum of opinion and that an ambiguous finding must be construed to sustain the judgment.

It is respectfully submitted that the Court of Appeals violated no canons of procedure but on the contrary acted entirely in accord with the Rules of Civil Procedure. The Court of Appeals had the entire record before it and reviewed the case properly. The petitioner seeks in effect only to reargue his case before a different tribunal. The petition for certiorari should be denied.

Respectfully submitted,

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